Supreme Court, U.S.
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No. 97-900

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KENNETH F. MADDEN,
Petitioner,
v.

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS; WILLIAM G. BERNARD, Individually and as General President of the International Association of Heat & Frost Insulators & Asbestos Workers; JAMES A. GROGAN, Individually and as General Secretary-Treasurer of the International Association of Heat & Frost Insulators & Asbestos Workers,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly determined that a local union officer, who had been removed from office after concededly failing to comply with directives from the local's parent international union to keep current in dues owed by the local union, to administer properly a local union trust fund and to maintain and file accurate membership records, and who did not adduce any evidence showing a nexus between his removal and any exercise of protected speech, had failed to raise a genuine issue of fact regarding whether he had been removed in retaliation for speech protected by Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2).

2. Whether a district court should accept a union's interpretation of its own constitution, in a suit by a union member against the union under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, alleging a breach of the union's constitution, in which the union member does not propose a contrary interpretation and cannot show that the union's interpretation is unreasonable or the product of bad faith.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The statement of the case offered by the Petitioner, Kenneth Madden, is noteworthy, not so much for what it includes, as for what it does not. The statement makes no reference to the extensive and largely uncontested history of Madden's misconduct, or the unsuccessful efforts of the International Association of Heat and Frost Insulators and Asbestos Workers ("International Association") to correct that misconduct, all of which preceded Madden's removal from office. That misconduct, and those efforts,

are summarized in the decision of International Association President William Bernard, issued after a hearing to determine whether Madden's removal was warranted:

> That evidence shows that you created an education and training fund for the members of Local 201, but operated the fund in a manner that violated the law, violated the trust agreement, and violated specific directions from the General Secretary-Treasurer. Although the law requires all joint trust funds to have an equal number of union and management trustees, the education and training fund had 4 union trustees and only 2 management trustees. The trust agreement provides that all checks must be signed by one union and one management trustee. Yet many of the fund's checks were signed only by you. Other checks were signed by you and another union trustee, and others were signed by you and the Local Union President, who is not a trustee.
>
> You also used the assets of the education and training fund to pay your own salary as business manager and financial secretary of Local Union 201, a practice prohibited by law. At the hearing you claimed that these payments were reimbursement for services that you had performed for the fund, but there is no evidence that you performed any services for the fund, other than your duties as trustee. Large sums were also paid from the fund to the Local Union purportedly as reimbursement for rent, accounting services and clerical services, all without the approval from the fund's trustees.
>
> When General Secretary-Treasurer Grogan discovered these practices, he directed you not to sign any more checks without the proper signatures and not to pay any more of the fund's money to the Local Union. He also directed you to call a meeting of the trustees to insure that the trust fund was properly operated. You not only ignored his directives, you also fabricated a story about obtaining approval to sign checks from the fund's attorney and the other

> trustees, a story that the attorney and all of the trustees denied.
>
> . . . .
>
> The record of the hearing convinces me that your removal from office is also justified by your persistent refusal to pay the dues owed by Local Union 201 to the International. As of February 1993, when Secretary-Treasurer Grogan met with you and your local union accountant and fund administrator, Local 201 owed over $140,000 to the International. At that time, Secretary-Treasurer Grogan told you that the International would hold that amount in abeyance, but that you were to make all payments due for 1993 in a timely fashion. Despite that directive, you paid nothing until I sent you a letter in August instructing you to pay part of the Local's indebtedness or face removal. I sent you another letter in September 1993 instructing you to pay $10,000 per month to reduce the Local's indebtedness and to pay all future dues in a timely manner. You paid the $10,000, but did not pay the Local's monthly dues in a timely manner.

Pet. App. 33-34.[1]

For the most part, Madden did not deny that he had engaged in the misconduct described in President Bernard's decision or that he had failed to comply with directives received from the International Association. As the district court observed, "Such instructions included demands that [Madden] keep current on Local 201 dues, abide by the terms of the Education and Training Fund, and maintain and file accurate membership records, *all of which* [*Madden*] *concededly failed to do*." Pet. App. 3 (emphasis added).

In an effort to suggest that his removal might be related to the exercise of free speech, rather than his misconduct,

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[1] The appendix attached to the petition is cited herein as "Pet. App." The joint appendix filed with the United States Court of Appeals for the Second Circuit is cited as "J.A."

Madden describes statements that he made at local union meetings in August and September 1993, prior to his removal. Pet. 4-5. He omits, however, the uncontested fact that no representative of the International Association was present at either of those meetings and that neither General President Bernard nor General Secretary-Treasurer Grogan was aware of anything that he said at those meetings. J.A. 69, 138, 208.

In the district court, Madden claimed that his removal violated Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2), which protects the right of union members "to express any views, arguments, or opinions," and violated unspecified provisions of the International Association's constitution. The district court granted the International Association's motion for summary judgment with respect to the Section 101(a)(2) claim, because the court found that Madden "ha[d] not adduced admissible evidence showing a legally sufficient nexus between the exercise of his free speech rights and his removal from office." Pet. App. 2.

The court also granted the International Association summary judgment with respect to Madden's claim, under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, that his removal had violated the union constitution, stating that "defendant Bernard, as International President, acted pursuant to his clear and explicit authority . . . to remove any local union officer for failure to abide by his instructions" and that Madden had "entirely fail[ed] to specify those aspects of the [constitutional provision] on which he purports to rely to support his § 301 claim." Pet. App. 3.

On appeal, the United States Court of Appeals for the Second Circuit, affirmed the judgment of the district court "for substantially the reasons stated by the district court." Pet. App. 8.

REASONS FOR DENYING THE WRIT

Examination of the district court's decision and Madden's petition to this Court demonstrates that this case does not raise any unresolved, important questions of federal law which should be settled by this Court. Essentially, Madden's contention is that he offered enough evidence to avoid summary judgment and that the district court did not attach to his evidence the significance that it deserved. The Court, however, "do[es] not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Because the result below turned largely on the inadequacy of Madden's showing of facts, the issues of law identified in his petition—which are not, in any event, important, unresolved issues of federal law—are not issues genuinely raised by this case.

I. THE DISTRICT COURT'S RESOLUTION OF MADDEN'S CLAIM UNDER SECTION 101(a)(2) OF THE LMRDA DOES NOT RAISE IMPORTANT, UNRESOLVED ISSUES OF FEDERAL LAW

Madden's primary contention appears to be that the district court's decision on his Section 101(a)(2) LMRDA claim is inconsistent with this Court's decision in *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), holding that Sections 101(a)(2) and 102 protect an elected union officer removed from office for speaking in opposition to a proposed dues increase at a local union meeting. Madden, however, never explains in what manner the decision of the district court contravenes *Lynn*. He states that under *Lynn*, his Section 101(a)(2) claim turns on whether his removal was in retaliation for protected speech—a proposition on which the district court and all of the parties agreed—and then argues at some length that "[t]he record demonstrates that it was." Pet. 9. Unfortunately for Madden, however, the district court, after reviewing the evidence offered by Madden (*e.g.*, evidence of statements made at union meetings of which the International Asso-

ciation had no knowledge), found that he "ha[d] failed to provide any admissible proof that his removal was in retaliation for, or in any casual way related to" protected speech.[2] Pet. App. 2.

Madden also describes at some length what he characterizes as evidence that the reasons given for his removal were pretextual and argues that such evidence entitled him to present to a trier of fact the question whether he was removed in retaliation for protected speech. Pet. 12-15. Because the evidence of pretext offered by Madden fell so far short of creating a genuine issue regarding whether the reasons for his removal were pretextual, this case simply does not involve the question whether a union officer, who cannot show any causal connection between protected speech and removal, can prevail under Section 101(a)(2) solely by offering evidence that the reasons given for removal were not genuine.

Madden, for example, refers to the facts that (after a long history of misconduct and noncompliance) Bernard prepared a draft letter of removal shortly before the deadline for compliance given in one of Bernard's letters to Madden; that trustees of the Education and Training Fund did not complain about Madden's administration of that fund; that the membership of Madden's local union never requested or ratified his removal; and that an employee of Madden's local union (his secretary) believed that Madden's removal was improper, personal and retaliatory.[3] Pet. 13-14. These facts simply do not in any

[2] Madden contends that Section 101(a)(2) precluded the International Association from removing him for his admitted failure to pay tens of thousands of dollars in dues, because he did not agree with the International Association on the amount that he owed. Pet. 10. No court has ever held that Section 101(a)(2) protects union officers, like Madden, from adverse consequences for failure to pay debts.

[3] Because Rule 15.2 requires Respondents to address Petitioner's misstatements of fact, we add the following: Madden refers to the

way suggest that the reasons given for Madden's removal were not genuine. Such evidence is so insubstantial that it does not even warrant serious discussion, and it is hardly surprising that neither the district court nor the court of appeals felt compelled to discuss the significance of such evidence. The role of pretext evidence in a Section 101(a)(2) case ought not to be decided in a case such as this, in which the plaintiff could not produce evidence of pretext creating a genuine issue of fact.

Madden also attempts to demonstrate that the district court incorrectly granted summary judgment dismissing his claim under Section 609 of the LMRDA, which provides that a labor organization may not "fine, suspend, expel, or otherwise discipline any of its members" for exercising rights protected by the LMRDA. 29 U.S.C. § 529. He contends that the district court improperly relied on *Finnegan v. Leu*, 456 U.S. 431 (1982), in which this Court held that the removal of an appointed union official did not violate Section 609 because "the term 'discipline,' as used in § 609, refers only to retalia-

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fact that the letter of removal referred prominently to his improper administration of a local union trust fund, but that a draft letter of removal prepared several weeks earlier did not. He does not mention, however, that the draft letter of removal was prepared before he met with an officer of the International Association who discovered that prior directives regarding the trust fund had not been followed and that additional serious problems existed. J.A. 137, 233, 236-37, 280-81. Madden also states, incorrectly, that the International Association did not ascertain whether his successor corrected the violations for which Madden was removed. Uncontested evidence shows that the International Association did ascertain that his successor was paying dues in a timely fashion and properly administering the local union trust fund. J.A. 605, 694-95. Madden states that others engaged in some of the same acts of which he was accused. Those to whom he refers are officials who, like Madden, signed trust fund checks without obtaining the signature of a management trustee, but who, unlike Madden, discontinued the practice when directed to do so. J.A. 137, 465-69. Finally, although Madden states several times that he complied with directives from the International Association, in the district court he conceded that he had not. Pet. App. 3.

tory actions that affect a union member's rights or status *as a member* of the union." *Id.* at 437 (emphasis in original).[4] According to Madden, this Court's decision in *Lynn* limited the holding of *Finnegan* to the removal of appointed, rather than elected, union officials. Pet. 15-16.

The difficulty with that argument is that, in *Lynn*, this Court addressed only the scope of Lynn's LMRDA Section 102 claim and specifically stated that "Lynn's § 609 claim is not before the Court." 488 U.S. at 353 n.5. Accordingly, *Lynn* cannot be read as defining the scope of Section 609. Moreover, if as the district court found, Madden failed to demonstrate a triable issue of fact regarding whether he had been removed in retaliation for protected speech, then he could not have avoided summary judgment on his Section 609 claim, even if his removal did constitute discipline under that section. This case, therefore, is not an appropriate vehicle for determining the scope of LMRDA Section 609.

II. THE DISTRICT COURT'S RESOLUTION OF MADDEN'S CLAIM UNDER SECTION 301 OF THE LMRA DOES NOT RAISE IMPORTANT, UNRESOLVED ISSUES OF FEDERAL LAW

In rejecting Madden's claim under Section 301 of the LMRA, that the International Association had breached its own constitution, the district court stated that it would accept the International Association's interpretation of its constitution unless Madden could demontrate that its in-

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[4] The Court observed, *id.* at 438, that in drafting Section 609 Congress had used essentially the same language as that used in Section 101(a)(5), 29 U.S.C. 411(a)(5), and that Congress plainly had not intended Section 101(a)(5) to apply to the removal of union officers. The Conference Report accompanying the bill that became the LMRDA expressly stated that Section 101(a)(5) "applies only to suspension of membership in the union; it does not refer to suspension of a member's status as an officer of the union." H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 31 (1959).

terpretation was unreasonable or the product of bad faith. Pet. App. 2-3. Madden contends that the district court erred in accepting that interpretation and placing upon him the burden of showing unreasonableness or bad faith. Pet. 17-19.

The degree of deference owed a union's interpretation, however, is material only in a case in which the plaintiff offers a contrary interpretation under which he or she could prevail. In this case, Madden did not offer such an interpretation. The district court held that, in removing Madden, President Bernard "acted pursuant to his clear and explicit authority, and that Madden had "entirely fail[ed] to specify those aspects of [the constitutional provision] on which he purports to rely to support his § 301 claim." Pet. App. 3. Accordingly, Madden lost, not because the court accepted the International Association's interpretation of its own constitution, but because in this case the meaning of the constitution was "clear and explicit" and because Madden did not propose any other interpretation. The district court's decision thus did not turn on the degree of deference owed the International Association's interpretation.

Moreover, there are few principles of federal labor law as firmly established as is the rule that courts should accept a union's interpretation of its own constitution, unless that interpretation is unreasonable or the product of bad faith. Lower courts have consistently applied this rule, regardless of whether the plaintiff was an individual union member or a local union. *E.g.*, *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991) (suit by local union officers and members against international union); *Newell v. IBEW*, 789 F.2d 1186, 1189 (5th Cir. 1986) (suit by members against international); *Stelling v. IBEW*, 587 F.2d 1379, 1388-89 (9th Cir. 1978), *cert. denied sub nom. Darby v. IBEW*, 442 U.S. 944 (1979) (members against international); *Vestal v. Hoffa*, 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied*,

406 U.S. 934 (1972); *English v. Cunningham*, 282 F.2d 848, 850 (D.C. Cir. 1960). *See also Boilermakers v. Hardeman*, 401 U.S. 233, 242-43 (1971) ("We find nothing in either the language or legislative history of § 101(a)(5) that could justify such a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members."); *Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463, 470-71 (1968) (In enacting LMRDA Title IV, Congress considered how best to legislate against perceived abuses "without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs."). The lower courts are not split over the existence or application of that rule and are not in need of guidance from this Court.

No valid reason exists to grant the writ sought by Madden. His petition to this Court represents little more than an effort to present the same arguments about the facts of this case that the disrict court and the court of appeals found to be unpersuasive.

CONCLUSION

For all the foregoing reasons, Madden's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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